IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CMFG LIFE INSURANCE COMPANY,
CUMIS INSURANCE SOCIETY, INC., and
MEMBERS LIFE INSURANCE COMPANY,

Plaintiffs,

v.

RBS SECURITIES, INC.,

Defendant.

OPINION & ORDER

12-cv-037-wmc

As contemplated by its earlier text-only order (dkt. #275), the court has now read and considered the "Reply" (dkt. #276) of plaintiffs CMFG Life Insurance Company, CUMIS Insurance Society, Inc., and Members Life Insurance Company (collectively, "CUNA Mutual"). Plaintiffs' motion for clarification or reconsideration (dkt. #254) seeks leave to argue rescission due to mistake based on the allegations in its First Amended Complaint ("FAC") (dkt. #29). Specifically, CUNA Mutual continues to argue in the Reply that it pled rescission due to mistake sufficiently in the FAC to have put defendant on notice of the broader scope of its rescission claim. This court continues to disagree. If anything, CUNA Mutual's Reply underscores the unfairness at this stage of the case of permitting the rescission claim to encompass the extremes of mutual mistake at one end and intentional fraud at the other, when misrepresentation was expressly and narrowly pled in the FAC.

A claim based on mutual "mistake" would require allegations of a misunderstanding that is "reciprocal and common to both parties, where each alike labors under a misconception in respect to the terms of the written instrument." *Gorton v. Hostak, Henzl &*

Bichler, S.C., 217 Wis. 2d 493, 508-09, 577 N.W.2d 617 (1998) (quotation omitted). CUNA Mutual pleads *no* facts in the FAC that make plausible the required factual element that RBS Securities and CUNA Mutual were laboring under a mutual misconception with respect to the securities. While the FAC contains a single reference to the *possibility* that RBS Securities "innocently" made the misrepresentations (FAC (dkt. #29) ¶ 9), that alone is not enough to put defendant on notice that plaintiffs are pursuing a separate theory of rescission by mutual mistake, especially since the complaint goes on to allege misrepresentation *expressly* as the basis for seeking rescission. (FAC (dkt. #29) ¶¶ 301-07 (pleading "Count I (Rescission on the Ground of Misrepresentation)".)

Even if the court were to consider the allegations in the Second Amended Complaint that all parties were "mutually mistaken" in their belief that the underlying mortgages had been properly underwritten, what then? If both were innocently duped, would rescinding the contract of sale and foisting the loss on defendant as seller be any more equitable than leaving it with plaintiffs as the buyer and holder in due course? Given that there is no returning the parties to their status quo ante, rescission based on mistake is no longer feasible. *See* Restatement (Second) of Contracts § 154 ("A party bears the risk of mistake when ... the risk is allocated to him by agreement of the parties, or ... he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or … the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so."); *see also Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42, 44 (1885) (refusing to rescind sale of diamond when both parties had believed it to be a topaz; the court held that "if [the seller] chose to sell it without further investigation as to its intrinsic value to a person who

was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain.").

More obvious still is CUNA Mutual's failure to allege facts in the FAC that make out a claim for rescission for *unilateral* mistake plausible, since this claim would have required an allegation of fraud or unconscionability. *Gielow v. Napiorkowski*, 2003 WI App 249, ¶ 23, 268 Wis. 2d 673, 672 N.W.2d 351 (noting that "mutuality of mistake is not required where the mistake is the product of fraud practiced by one party to the agreement against the other").[1] Here, the FAC not only fails to plead fraud with particularity as required by Fed. R. Civ. P. 9(b), it actually disavows any claim of fraud. (*See* FAC (dkt. #29) ¶ 9.) The FAC, couched entirely in the terms of negligent misrepresentation and alleging no facts supporting either RBS Securities' superior knowledge or bargaining power relative to CUNA Mutual in this transaction, is simply inadequate to support a claim of rescission due to fraud or unconsionability. Allowing CUNA Mutual to completely change the nature -- and indeed the stakes -- of this litigation, given the pains plaintiffs themselves took to plead *no* claim based on fraud, would be wholly prejudicial to defendant's litigation decisions to date.

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[1] "Essential conditions" for equitable relief based on "a unilateral mistake by a rescission of the contract" are:

> (1) the mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable; (2) the matter as to which the mistake was made must relate to a material feature of the contract; (3) generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake; (4) it must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him in statu[s] quo.

Miller v. Stanich, 202 Wis. 539, 233 N.W. 753 (1930) (quoting A.G.S., *Unilateral Mistake as Basis of Bill in Equity to Rescind the Contract*, 59 A.L.R. 809 (1929)). Not only does CUNA Mutual not allege unconscionability or the ability to return RBS Securities to the status quo, neither of those "essential conditions" are present here.

Even if adequately pled, the court also found that CUNA Mutual acted with undue delay in seeking leave to amend its complaint to plead a theory of rescission due to mistake. (Dkts. ##245, 273.) Tellingly, CUNA Mutual still offers no reason for its delay in its Reply. The court also finds CUNA Mutual's arguments as to the lack of prejudice to defendant unpersuasive. As RBS Securities points out, CUNA Mutual's Second Amended Complaint adds nearly 600 new paragraphs to the FAC. The court allowed CUNA Mutual to proceed with that pleading, but only if it did not change the nature of its essential theories of liability since it inexplicably delayed the expansion of its original narrowly-tailored theory of liability. Were it to revisit that ruling at all, the court would be far more inclined to deny *any* further amendment than to permit the basic tenor and theory of the lawsuit to be altered.

Having expressly labeled its claim for rescission as based on "misrepresentation," induced defendant to proceed with discovery on that basis and (until recently) couched its entire complaint in those terms, it is too late for CUNA Mutual to broaden this claim.

ORDER

IT IS ORDERED that plaintiff CUNA Mutual's motion for reconsideration (dkt. #254) on the issue of whether it may argue rescission on the grounds of mutual mistake is DENIED.

Entered this 8th day of October, 2013.

BY THE COURT:
/s/

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WILLIAM M. CONLEY
District Judge